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THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PARKER MICHAEL KNIGHT,

Case No.: 3:13-cv-1211-BR

Plaintiff

v.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

DEPARTMENT OF THE ARMY,

Defendant.

Defendant, the Department of the Army, by S. Amanda Marshall, United States Attorney for the District of Oregon, and James E. Cox, Jr., Assistant United States Attorney for the District of Oregon, submits this memorandum in support of Defendant's motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted.

I. INTRODUCTION

Plaintiff Parker Michael Knight (“Plaintiff” or “Knight”) is a former Army service member who alleges that he was subjected to sexual and physical assaults by fellow soldiers from 2002-2007. In his *pro se* complaint, Knight asserts claims for assault, fraud and emotional distress, and he alleges that he has been subjected to discrimination based on disability, race and age. Knight’s complaint should be dismissed pursuant to Federal Rule of Procedure 12(b)(1) and 12(b)(6).

To the extent Knight is asserting an employment discrimination claim, the Complaint fails to plead basic facts that would give rise to such a claim, much less demonstrate the requisite plausible entitlement to relief. Thus, any such claim should be dismissed under Fed. R. Civ. P. 12(b)(6).

Furthermore, the Court lacks subject matter jurisdiction over any tort claim for three reasons. First, Knight has not submitted an administrative tort claim to the Army as required under the Federal Tort Claims Act (“FTCA”). Second, the torts alleged in the Complaint are intentional torts for which the government has not waived its sovereign immunity. Third, the Court lacks jurisdiction under the *Feres* doctrine, which bars governmental liability for claims which rise out of or are in the course of activity incident to military service. Thus, Knight’s tort claim should be dismissed under Fed. R. Civ. P. 12(b)(1).

II. FACTUAL BACKGROUND

Plaintiff Parker Knight is a resident of Portland who served in the United States Army from 2002-2007. (Complaint at p. 1.) Knight filed this action in Multnomah County Circuit Court but the case was removed by the Army to this Court pursuant to 28 U.S.C. § 1442(a)(1). (ECF 1.)

Knight claims that during his entry-level Army training he was “molested, assaulted,

threatened, harassed, racially discriminated, and received numerous hazing” by his non-commissioned officers (“NCOs”) supervising his training. (Complaint at p. 1.) He further claims that this abuse continued during a deployment to Iraq in 2004 where he was allegedly choked, maimed, sexually harassed, and molested by NCOs and officers. (*Id.* at p. 2.) Knight has alleged he had to undergo several surgeries due to this abuse, that he was medically chaptered out of the Army as a result, and that he is rated by the VA as having a 100% service connected disability. (*Id.* at p. 3.)

Knight states that he feels his rights under the Americans with Disabilities Act (“ADA”) have been violated due to discrimination based on disability, race and age. (*Id.*) He asserts counts for relief for emotional distress, slander and fraud. (*Id.*) He seeks \$500,000 in compensatory damages and \$500,000 in punitive damages. (*Id.* at p. 4.)

III. STANDARD OF REVIEW

“Federal courts are courts of limited jurisdiction.” *Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “It is to be presumed that a cause lies outside this limited jurisdiction[], and the burden of establishing the contrary rests upon the party asserting jurisdiction [].” *Id.* (internal citations omitted). Federal Rule of Civil Procedure 12(b)(1) authorizes a party to raise a defense of lack of subject matter defense by motion. “The defense of lack of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In addressing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), “no presumptive truthfulness attaches to plaintiff’s allegations.” *Id.* (citations omitted).

A Rule 12(b)(1) motion can either challenge the sufficiency of the pleadings to establish federal jurisdiction or the substance of the jurisdictional allegations despite the formal sufficiency of the complaint. *See Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003); *Thornhill Publ. Co. v. Gen'l Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Where defendant challenges the actual existence of jurisdiction, plaintiff's allegations are not presumed to be truthful, and plaintiff has the burden of proving jurisdiction exists. *Id.* In addition, it is proper for the moving party to submit an affidavit in support of a motion to dismiss under Rule 12(b)(1). *See Savage*, 343 F.3d 1039-40 n2; *see also Ass'n of Am. Medical Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). In opposing the motion, plaintiff must present admissible evidence to satisfy this burden. *See id.* The court is presumed to lack subject matter jurisdiction until plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Standard for Federal Rule of Civil Procedure 12(b)(6) Dismissal

Rule 12(b)(6) governs dismissal for failure to state a claim on which relief can be granted. A court should grant a Rule 12(b)(6) motion where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). The complaint must be construed in the light most favorable to the plaintiff. *Parks Sch. of Bus., Inc. v. Syminton*, 51 F.3d 1480, 1484 (9th Cir. 1995). The Court, however, need not accept as true conclusory allegations, legal characterizations or unreasonable inferences. *Taylor v. FDIC*, 132 F.3d 762 (D.C. Cir. 1997). Nor does the Court need assume that the plaintiff can prove facts different from those alleged. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to

relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Thus, the grounds must amount to “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Id.* at 555. This “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). “Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678 (internal quotations omitted).

IV. ARGUMENT

A. Knight Has Failed to State an Employment Discrimination Claim for Relief.

Knight asserts that he has experienced discrimination based on disability, race and age, but the Complaint does not include any facts that would support a claim for relief under any law which provides a right of action for forms of employment discrimination, such as the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*, Title VII of the Civil Right Act of 1964, 42 U.S.C. § 2000e, *et seq.*, or the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, *et seq.* For example, the Complaint does not specify what acts of discrimination the Army allegedly committed. *See Mathon v. Feldstein*, 303 F. Supp. 2d 317, 325 (E.D.N.Y. 2004) (dismissing discrimination claim on the ground that a “complaint that contains only vague and conclusory claims with no specific facts supporting the allegations may not give the defendant fair notice”) (internal quotations omitted). Nor does it include basic elements of age and disability claims, such as allegations that establish the plaintiff is a person who qualifies for protection under the relevant law. *See Hale v. King*, 642 F.3d 492, 501 (5th Cir. 2011) (“Absent allegations that [plaintiff]’s ailments substantially limited him in the performance of a major life activity, [plaintiff] has failed to state a claim for relief under subsection A of the ADA’s definition of

disability.”); *Putkowski v. Warwick Central School Dist.*, 363 F. Supp. 2d 649, 654-55 (S.D.N.Y. 2005) (holding that a plaintiff who pleads only that he “suffered a disability” fails to state a claim under the Rehabilitation Act of 1973 on which relief may be granted); *Torres v. Dept. of Veterans Affairs*, No. 02 Civ.9601(HBP), 2004 WL 691237, *6 (S.D.N.Y. March 31, 2004) (holding that plaintiff who fails to allege that she was at least 40 years of age fails to state a claim for relief under the ADEA);

In fact, the three “counts” Knight asserts are not discrimination claims, rather they are common law tort claims for slander, fraud, and emotional distress. Moreover, the gravamen of his complaint sounds in tort, with the alleged wrongdoing consisting primarily of intentional assaults by fellow Army service members.

Thus, Knight’s Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because it fails to plead facts that would give rise to an employment discrimination claim, much less demonstrate a plausible entitlement to relief. *See Williams v. Boeing Co.*, 517 F.3d 1120, 1131 (9th Cir. 2008) (holding that Plaintiffs’ general allegations that they were discriminated against with regard to “terms of employment” did not provide “fair notice” of a compensation discrimination claim); *see also Dejesus v. HF Mgmt. Services, LLC*, --- F.3d ----, 2013 WL 3970049 (2nd Cir. August 5, 2013) (holding that complaint which “tracked the statutory language of the FLSA, lifting its numbers and rehashing its formulation, but alleging no particular facts sufficient to raise a plausible inference of an FLSA overtime violation . . . [was] inadequate and properly dismissed” under Fed. R. Civ. P. 12(b)(6)).

Knight’s pleading failure is also important due to the requirement that complaints of discrimination be brought to the attention of an EEO Counselor “within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the

effective date of the action.” 29 C.F.R. § 1614.105(a)(1). “Absent waiver, estoppel, or equitable tolling, failure to comply with [the 45 day] regulation is fatal to a federal employee’s discrimination claim.” *Kraus v. Presidio Trust Facilities Div.*, 572 F.3d 1039, 1043 (9th Cir. 2009) (internal quotations and citations omitted). The complaint should be dismissed because it fails to include any allegations that would demonstrate that Knight complied with this requirement. *See Torres*, 2004 WL 691237, at *4-5 (dismissing complaint because plaintiff failed to allege that she sought EEO counseling within 45 days of the allegedly discriminatory act or make any argument in support of a waiver, estoppel or an equitable toll).

Finally, if Knight’s purported employment claims are about applications for employment with federal agencies after his military service, then those claims should be directed at the federal agencies to which he has applied for employment, not the Army. In fact, Knight has filed a number of cases recently in this court and state court in which he appears to raise such claims. *See Knight v. Bonneville Power Admin., et al.*, Case No. 3:13-cv-1159-BR, *Knight v. USA JOBS, et al.*, Case No. 3:13-cv-1160-BR; *Knight v. Federal Bureau of Investigation*, Case No. 3:13-cv-1212-BR (removed from state court); *Knight v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Case No. 3:13-cv-1346-BR (removed from state court); *Knight v. U.S. Food and Drug Administration*, Case No. 3:13-cv-1347-BR (removed from state court); *Knight v. U.S. Department of Veterans Affairs*, Case No. 3:13-cv-1349-BR (removed from state court); *Knight v. U.S. Department of Veterans Affairs*, Case No. 3:13-cv-1350-BR (removed from state court).

B. The Court Lacks Subject Matter Jurisdiction Over the Tort Claims Plaintiff Alleges.

1. Plaintiff has failed to exhaust his administrative remedies.

The Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346, 2671-2680, is the exclusive remedy for monetary damages from the government for “personal injury or death arising or

resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. § 2679. A plaintiff may not bring an action against the United States under the FTCA “unless the claimant shall have first presented the claim to the appropriate Federal agency.” 28 U.S.C. § 2675(a). Only when the claim has been “finally denied by the agency in writing” or when there has been a “failure . . . to make final disposition of a claim within six months after it is filed” may a plaintiff institute an action in federal court. *Id.* This administrative claim prerequisite is “jurisdictional in nature and may not be waived.” *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977); *see also Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995). “The burden is on the plaintiff to both plead and prove compliance with the statutory requirements.” *In re “Agent Orange” Product Liability Litig.*, 818 F.2d 210, 214 (2nd Cir. 1987); *see also Grantham v. Durant*, 471 F. Supp. 2d 1069, 1076 (D. Nev. 2006).

Knight has not pled that he filed an administrative tort claim with the Army, and Army records do not indicate one was filed. (Declaration of Lorenzo Ferguson) Thus, the Court lacks jurisdiction over Knight’s claims.

2. The United States has not waived sovereign immunity for the intentional torts alleged by Plaintiff.

The FTCA’s waiver of sovereign immunity has numerous exceptions, including an exception for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” 28 U.S.C. § 2680(h). The slander and fraud claims asserted in Knight’s complaint fall within this “intentional tort” exception to the FTCA’s waiver of sovereign immunity. Furthermore, the allegations in support of the emotional distress claim focus on

alleged assaults, another tort for which the government has also not waived its sovereign immunity.

Thus, the complaint should be dismissed because the government has retained its sovereign immunity from liability for the claims asserted. *Broudy v. United States*, 661 F.2d 125, 127 (9th Cir. 1981) (“[I]f a claim falls within any exception the court is without jurisdiction to hear the case.”); *see also Kashin v. Kent*, 457 F.3d 1033, 1037 (9th Cir. 2006) (“[B]ecause the United States retains its sovereign immunity, the action will be dismissed.”); *Owyhee Grazing Ass’n, Inc. v. Field*, 637 F.2d 694, 697 (9th Cir. 1981) (“[C]laims against the United States for fraud or misrepresentation by a federal officer are absolutely barred by 28 U.S.C. § 2680(h).”).

3. Plaintiff’s claim is barred by the *Feres* doctrine.

Knight’s complaint appears to solely allege intentional torts for which the government has not waived sovereign immunity. Nonetheless, due to the applicability of the *Feres* doctrine, the Court would still lack jurisdiction even if Knight had alleged negligence. “[I]n *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court held that the United States is not liable for injuries that ‘arise out of or are in the course of activity incident to service’ because the United States did not intend to waive its immunity to such claims.” *McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007). “This broad exception has been labeled ‘the *Feres* doctrine.’” *Id.* (internal quotations omitted).

“[T]he most persuasive justification for the *Feres* doctrine is the potential impact of civil suits on military discipline.” *Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir. 1983). “In determining whether a service member’s injury is ‘incident to service’ and therefore, barred under the *Feres* doctrine, [the courts] have employed a case-by-case approach, addressing four factors:

(1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.”

McConnell, 478 F.3d at 1095. None of the factors is dispositive, as a totality of the circumstances analysis is utilized. *Id.* “The fundamental goal of the *Feres* doctrine is to safeguard the military disciplinary structure from disruptive civil suits.” *Johnson*, 704 F.2d at 1039.

The *Feres* doctrine applies to FTCA actions based on alleged sexual assaults of service members. *See Dexheimer v. United States*, 608 F.2d 765, 767 (9th Cir. 1979); *Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999); *Gonzalez v. U. S. Air Force*, 2004 WL 339596 (10th Cir. Feb. 24, 2004); *Corey v. United States*, 1997 WL 474521 (10th Cir. Aug. 20, 1997); *see also Cioca v. Rumsfeld*, --- F.3d ----, 2013 WL 3802932 (4th Cir. July 23, 2013) (using rationale of *Feres* doctrine to hold that there was no *Bivens* remedy for service members who alleged that acts and omissions of former defense secretaries in their official capacities contributed to a military culture of tolerance for the sexual crimes perpetrated against them). Thus, the Court also lacks jurisdiction over Knight's claims due to the *Feres* doctrine.

V. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss the Complaint with prejudice.

Dated this 14th day of August, 2013.

Respectfully Submitted,

S. AMANDA MARSHALL
United States Attorney
District of Oregon

/s/ James E. Cox, Jr.
JAMES E. COX, JR.
Assistant United States Attorney
Attorneys for Defendant the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing: **Memorandum in Support of Defendant's Motion to Dismiss**, was placed in a postage prepaid envelope and deposited in the United States Mail according to established office procedure in the Office of the United States Attorney at Portland, Oregon, on August 14, 2013, addressed to:

Parker Michael Knight
45 SE 196th Ave.
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/s/ James E. Cox, Jr.
JAMES E. COX, JR.